S.B. CIVIL SECOND APPEAL NO.155/2005

LRs. Of late Shaman @ Chaman and another

vs.

Daulat Singh Chelawat and others.

Date : 7.9.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. Suresh Srimali a/w Mr.R.Choudhary, for the appellants.

Dr. Pratistha Dave a/w Mr.Rajat Dave, for the respondents.

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Heard learned counsel for the parties.

The appellants/tenants are aggrieved against the concurrent findings recorded by the two courts below against the appellants in a suit filed for recovery of possession of the suit premises by the respondents/landlords.

The plaintiffs/respondents filed a suit for recovery of possession against one Shaman @ Chaman and Purshottam on the grounds that the suit property was let out to the defendant no.1 and he has committed default in payment of rent for the period of 23 months from 21.12.1997 to 21.12.1999 and in view of the above, the plaintiffs are entitled for decree of possession on the ground of default. Another ground for eviction is that the defendants acquired suitable residential accommodation for his residence and also shifted to his new residence. The plaintiffs gave the particulars of the house which is occupied by the defendant

no.1. The third ground for eviction is that the plaintiffs are in need of the suit premises for running their business of medicines as the plaintiff no.1 retired from service and her daughter-in-law is having qualification to run the medical shop. Therefore, they want to run the medical shop in the property in dispute. Yet another ground for eviction is that the suit property has been sublet to the defendant no.2. In the trial court, both the defendants submitted written statements separately. According to the defendant no.1, he paid the rent and, therefore, he is not defaulter as there was no arrears of rent for six months due at the time of filing of the suit by the plaintiffs. The defendant no.1 submitted that he is karta of his joint family and due to expansion in the family, some of the family members left the house and started living separately. According to the defendant no.1 at the time of filing suit, the defendants were residing in the house in dispute and the defendant no.2 is not sub-lettee but he is living as member of defendant no.1's family. Both the defendants also submit that the plaintiffs have other properties where they can open medical shop.

The defendant no.2 also took the same plea and stated that he is not sub-lettee and the rent of the suit shop was deposited in the court under the provisions of Section 19A of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act').

The rejoinder was also filed. During the pendency of the suit, the defendant no.1 – original tenant died and his legal representatives were taken on record.

Issues were framed for all the pleas taken by the plaintiffs for passing decree for eviction against the tenants. The plaintiffs produced witnesses PW1 Daulat Singh, PW2 Rajnish, PW3 Asha, PW4 Surendra Bapna, PW5 Hanuman Singh whereas the defendants produced witnesses DW1 Smt. Kavita and DW2 Purshottam. Rent deed Ex.1 was exhibited along with other documents by the plaintiffs whereas the defendants produced as many as 35 documents.

Two courts below concurrently held that the rent of the suit premises was paid and the defendants were not defaulters in payment of rent in terms of Section 13(1)(a) of the Act. Both the courts below held that the suit property was let out to the defendant no.1 alone and he did not took the property on rent for joint family. The courts below held that the original tenant vacated the suit premises and started living at the place where the original tenant/defendant no.1 died as this fact has been admitted by the defendants themselves. The courts below rejected the plea of not having self residential accommodation of the defendant no.1 to be of his own. The issue of subletting was also decided in favour of the plaintiffs.

The judgment and decree of the trial court dated 27.9.2002 was challenged by the tenants by filing appeal which was dismissed by the first appellate court vide judgment and decree dated 24.1.2005.

According to learned counsel for the appellants, the first appellate court committed serious error of law in rejecting the appellants' application filed under Order 26

Rule 9 CPC for appointing Commissioner to inspect the site and furnish a report in support of the appellants' plea that during pendency of the appeal, about 14-15 shops have already been vacated by various tenants of the plaintiffs and, therefore, the need of the plaintiffs stands satisfied rather the plaintiffs have more than required shops and vacant and also in their possession. Learned counsel for the appellant also submitted that the plaintiffs earlier also filed the suit for recovery of possession on the ground of appellants shifting from rented premises to another premises and on the ground of subletting of the suit premises to the defendant no.2. That suit was dismissed by the trial court on 25.2.1995 and the appeal against that decision of the trial court was dismissed by the appellate court on 27.4.1997. Therefore, according to learned counsel for the appellant, the present suit filed by the plaintiffs is barred under Order 9 Rule 9 CPC. According to learned counsel for the appellants, the plaintiff himself admitted in his statement before the trial court that he filed a suit for eviction of deceased tenant on the same grounds which are the grounds taken in this suit except the ground of default. Learned counsel for the appellants also submitted that the appellants themselves admitted that the defendant no.1 vacated the house about 18 years ago and thereafter, he accepted the rent of the premises, therefore, the plaintiffs waived their right and are not entitled for decree for possession.

I have considered the submissions of learned counsel

for the parties and perused the reasons given in the judgments of two courts below.

So far as filing of the earlier suit is concerned, no specific plea was taken by the appellants in the written statement except mentioning that earlier suit was filed in the year 1985 and that was dismissed by the trial court. Since no specific plea was there, therefore, no issue was framed by the trial court about bar against the present suit on the ground that the earlier suit filed on the same cause of action was dismissed by the court and, therefore, no second suit for same cause of action is maintainable. The said plea was not taken even before the first appellate court, therefore, now the appellants cannot be permitted to raise this new ground which substantially is a mixed question of fact and law and not pure question of law. Not only this, but neither the copy of the earlier filed suit and copy of the issues and copy of the judgments are submitted by the defendant/tenant/appellant.

So far as the admission of the plaintiffs that he filed the suit on the basis of same grounds is an evidence in absence of any pleading of the defendants in defence, therefore, it cannot be said that the plaintiffs admitted the case that the earlier suit was filed on the basis of same cause of action of acquiring the suitable residential accommodation by the defendants.

It will be worthwhile to mention here that the earlier

suit was filed in the year 1985 and this suit was filed in the year 1999 and there is gap of 14 years in between. Therefore, for getting decision, the appellants should have laid down foundation for that purpose and which has not been laid down by the appellant. Therefore, the defendants cannot take benefit of statement of plaintiff which has come in evidence without context and without there being any defence of the defendant. Two courts below concurrently, after considering the pleas of the defendants, recorded the finding that the property was not rent out to any Joint Hindu family or was taken by the defendant no.1 for his family, therefore, this Court is not again to look into the evidence produced by the parties and merely because the tenant paid the rent to the landlord after vacating the premises does not mean that the landlord waived his right. In view of the above, it is clear that the two courts below have rightly held that the defendant no.1 alone was tenant and from evidence, they rightly reached to the conclusion that the defendant no.1 vacated the suit premises and started living in his own house. So far as finding of fact about acquiring suitable accommodation by the defendant no.1 is concerned, that is based on evidence. The defendant no.2 is in occupation of the suit premises and is not residing as family member of the defendant no.1 in the suit premises. In the totality, all these grounds have been proved by the landlord and two courts below very carefully examined the facts of the case.

So far as the appellants' contention before the first

appellate court that the plaintiff acquired possession of about 14-15 shops and, therefore, the need of the plaintiff is satisfied is concerned, it will be worthwhile to mention that the plea was taken by the person who is residing in the same building but he failed to disclose the circumstances in which about 14-15 shops were vacated by the various tenants and the possession was handed over to the plaintiff. Apart from it, he did not disclose the names of the tenants who vacated the premises. The first appellate court, on these grounds, refused to allow the application of the appellants for appointing a receiver under Order 26 Rule 9 CPC. It will further be worthwhile to mention here that the appellants, even when came to know that 14-15 shops have been vacated by the tenant, he did not submit any application under Order 7 Rule 7 CPC for taking on record the subsequent events nor he sought permission to amend the written statement or sought permission to amend the appeal. In these facts and circumstances, if the first appellate court rejected the application of appointing the Commissioner, in the facts of the case, it cannot be said that the first appellate court has failed to exercise the jurisdiction vested in it and committed any error of law as even the evidence collected by the Commissioner under Order 26 Rule 9 CPC could be read only in support of the pleadings or even for proving the subsequent event but the fact has not been brought on record in a proper manner by the appellants.

In view of the above, I do not find that any

substantial question of law is involved. Accordingly, this appeal deserves to be dismissed and is hereby dismissed.

However, at this stage, learned counsel for the appellants prays that some time may be granted to the appellant to vacate the premises.

Learned counsel for the respondents vehemently submitted that no time be given to the appellants because the original tenant has left the house and he is sub-lettee.

Looking to the totality of the facts, it will be just and proper to grant some time to the appellant to vacate the premises upto 30.4.2006.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months that he shall hand over the vacant possession to the landlord by or before 1.5.2006 ; shall not transfer or sublet the premises in question and shall pay all the decretal amount arrears of rent, if due, within a period of two months from today, the decree under challenge shall not be executed till 1.5.2006. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court. In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

(PRAKASH TATIA), J.

S.Phophaliya